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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 CHARLOTTE BENNETT,

4 Plaintiff,

5 v.

22 Civ. 7846 (VSB) (SLC)

6 ANDREW M. CUOMO, MELISSA
7 DEROSA, JILL DESROSHIERS,
and JUDITH MOGUL,

8 Conference

9 Defendants.

10 -----x

11 New York, N.Y.

May 8, 2024

12 3:00 p.m.

13 Before:

14 HON. SARAH L. CAVE,

15 U.S. Magistrate Judge

16 APPEARANCES

17 KATZ BANKS KUMIN

Attorneys for Plaintiff

18 BY: DEBRA KATZ (by telephone)

LAURA SCHNELL

KAYLA MORIN

19 SHER TREMONTE

20 Attorneys for Defendant ANDREW W. CUOMO

21 BY: THERESA TRZASKOMA

ALLEGRA NOONAN

22 BRACHAH GOYKADOSH

23 OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

Attorneys for OFFICE OF THE ATTORNEY GENERAL

24 BY: ANDREW AMER

SERENA LONGLEY

25 JAMES COONEY

MICHAEL JAFFE

O58UBENC

APPEARANCES CONTINUED:

CLEARY GOTTlieb STEEN & HAMILTON LLP
Attorneys for CLEARY

BY: ANDREW WEAVER

VLADECK, RASKIN & CLARK P.C.
Attorneys for YANNICK GRANT

BY: YANNICK GRANT

GLAVIN PLLC
Attorneys for Defendant ANDREW M. CUOMO

BY: RITA GLAVIN (by telephone)

MORVILLO PLLC
Attorneys for Defendant MELISSA DeROSA

BY: GREGORY MORVILLO (by telephone)

ORRICK HERRINGTON & SUTTCLIFFE LLP
Attorneys for Defendant JUDITH MOGUL

BY: MICHAEL DELIKAT (by telephone)

ORIN SCHWAB
Attorney for Defendant JILL DesROSIERS

O58UBENC

1 (Case called)

2 THE COURT: We'll start with you, Ms. Katz. Can you
3 hear us?

4 MS. KATZ: Yes. Debra Katz here. Thank you.

5 THE COURT: Mr. Cuomo's counsel?

6 MS. TRZAKOMA: Good afternoon, your Honor.

7 Theresa Trzaskoma, from Sher Tremonte, on behalf of
8 former Governor Cuomo.

9 MS. NOONAN: Good afternoon, your Honor.

10 Allegra Noonan, also on behalf of Governor Cuomo, from
11 Sher Termonte.

12 THE COURT: Good afternoon.

13 And we do we have Ms. Glavin on the phone?

14 MS. GLAVIN: Yes, your Honor.

15 Rita Glavin, Glavin PLLC on behalf of the former
16 governor.

17 THE COURT: And Ms. or Mr. Goykadosh?

18 MR. AMER: For the Attorney General's Office, Andrew
19 Amer.

20 THE COURT: Okay.

21 MS. LONGLEY: Good afternoon, your Honor.

22 My name is Serena Longley, also on behalf of the New
23 York State Office of the Attorney General.

24 THE COURT: Okay. Good afternoon.

25 All right. Ms. DeRosa's counsel?

O58UBENC

1 MR. MORVILLO: Good afternoon.

2 I'm Gregory Morvillo, on behalf of Ms. DeRosa.

3 Thank you for allowing me to appear by telephone.

4 THE COURT: Of course.

5 Ms. Mogul's counsel?

6 MR. DELIKAT: Good afternoon, your Honor.

7 Michael Delikat, on behalf of Judy Mogul.

8 THE COURT: Okay. Good afternoon.

9 Cleary's counsel?

10 MR. WEAVER: Good afternoon, your Honor.

11 Andrew Weaver of Cleary Gottlieb Steen & Hamilton, on
12 behalf of Cleary.

13 THE COURT: Good afternoon.

14 And Vladek's counsel?

15 MR. GRANT: Good afternoon.

16 Yannick Grant on behalf of Vladeck Raskin.

17 THE COURT: All right. Great. Thank you.

18 Anyone else that I missed who would like to state
19 their appearance?

20 MS. SCHNELL: Laura Schnell, your Honor, for
21 plaintiff, Charlotte Bennett, as well as Kayla Morin, of the
22 Katz Firm also.

23 THE COURT: Okay. Good afternoon.

24 Anyone else?

25 MR. SCHWAB: Good afternoon, your Honor.

O58UBENC

1 Sorin Schwab on behalf of Jill DesRosiers.

2 THE COURT: Anyone else?

3 All right. Very good.

4 So we're here to this afternoon, as everyone knows, on
5 the motions to compel and corresponding motions to quash with
6 respect to the subpoenas to both the Attorney General as well
7 as the two law firms, ECF Nos. 199, 222, 207, and 227.

8 The way I'd like to proceed is to hear from
9 Mr. Cuomo's counsel first and then from the Attorney General
10 and then from the law firms and then to give Mr. Cuomo's
11 counsel to chance to respond and then anyone else who wishes to
12 be heard, to speak.

13 So, Ms. Trzaskoma, if you prefer to sit or stand
14 wherever you're more comfortable.

15 MS. TRZAKOMA: I will stand, your Honor.

16 THE COURT: Okay.

17 MS. TRZAKOMA: Thank you.

18 So I was rereading the briefing, quite voluminous
19 briefing, in this matter, and I just want to state at the
20 outset this that is not a grudge match. Yes. We and our
21 client believe that the Attorney General's report was deeply
22 flawed. In fact, we know it was, it is, because the Attorney
23 General investigators never obtained or reviewed or considered
24 hundreds or potentially thousands of highly relevant documents
25 that directly undercut Ms. Bennett's claims, but proving that

O58UBENC

1 the Attorney General conducted a biased and incomplete and
2 flawed investigation is not what's currently at issue in the
3 motions before your Honor. What is currently on the table is
4 Governor Cuomo's ability to obtain evidence to prove that
5 Ms. Bennett's allegations are false and that the legal claims
6 that she has brought against Governor Cuomo have no merit, that
7 Ms. Bennett's lawsuit overlaps with the Attorney General's
8 investigation does not in any way make the subpoenas improper.
9 We are entitled to discovery of relevant documents that are
10 proportional to the needs of the case, and in this case,
11 Ms. Bennett's allegations are broad. She doesn't allege a
12 single incident or two. She alleges that her entire work
13 environment was inflicted -- infected with bias. And the
14 documents that we seek here are a few dozen -- statements of a
15 few dozen witnesses who worked in the executive chamber. Those
16 witnesses who were interviewed in the context of an
17 investigation into potential sexual harassment at the executive
18 chamber could not be more relevant, nor do we believe if there
19 is any significant burden on the Attorney General's Office to
20 produce those materials particularly because they have already
21 been redacted for any conceivable work product or other
22 privilege.

23 THE COURT: If I could just interrupt one moment,
24 Ms. Trzaskoma. I noticed that in the Eastern District case,
25 the Cuomo versus Attorney General case, the subpoena there has

O58UBENC

1 been -- the original subpoena was withdrawn and has since been
2 narrowed. I didn't look to see the specifics of what was
3 narrowed but can that be done here? Is there any narrowing of
4 the subpoena to the OAG that can be done here?

5 MS. TRZAKOMA: Your Honor, we don't know who was
6 interviewed, so I'm not sure if there's a possibility of
7 narrowing, but I do think that each of the witnesses who were
8 executive chamber employees or who mentioned Ms. Bennett or
9 Ms. Boylan, would be relevant, and, again, we're talking about
10 witness statements. We've provided your Honor with an example
11 of one that are fairly straightforward, not voluminous. So I
12 think, you know, in terms of proportionality, they can be
13 turned over with a push of a button.

14 THE COURT: And how did you get the one from
15 Ms. Brady? I'm assuming that you're referring to what was
16 attached to your reply declaration. How did you come to have
17 that one?

18 MS. TRZAKOMA: So, as you may have read in the
19 Attorney General's papers, they did provide certain district
20 attorney's offices with copies of certain investigative
21 materials including interview memos and in a now-dismissed
22 criminal case that was brought against our client, the district
23 attorney in that proceeding provided them to Governor Cuomo's
24 counsel as part of criminal discovery.

25 THE COURT: Okay. And is that the only memo that you

O58UBENC

1 have?

2 MS. TRZAKOMA: No, your Honor. We have 31 of them.
3 So to the extent -- so our reading of the Attorney General's
4 Office papers is that our request would encompass approximately
5 85. So we already have just 31 of those. So I think it's, you
6 know, it's -- it's several dozen but it's not more than, I
7 don't think, 50.

8 THE COURT: Okay. So you have 31 of the 85 that you
9 are seeking in the subpoena?

10 MS. TRZAKOMA: Correct.

11 THE COURT: Okay. And the 31 that you have, are those
12 are the ones that you're saying that the Attorney General's
13 Office has voluntarily provided to you, or through some other
14 means?

15 MS. TRZAKOMA: Those were provided by the AG's Office
16 to the district attorney, and the district attorney -- the
17 Albany District Attorney turned them over.

18 THE COURT: Okay. So, in that one criminal case,
19 you're saying there were 31 memos that the Attorney General
20 provided to the district attorney, the district attorney then
21 provided them to you as part of discovery, but that's the only
22 channel through which you've received -- Mr. Cuomo has received
23 those?

24 MS. TRZAKOMA: Correct. And at this point, the
25 requests in this case are -- we did narrow in trooper 1 but

O58UBENC

1 those were narrowed to interview memos involving New York State
2 Police employees, and as you may know, in that case, the
3 complaint, it's a rehash of the entire AG report so it -- we
4 also -- our request includes other claimants.

5 THE COURT: Okay.

6 MS. TRZAKOMA: Thank you.

7 THE COURT: Sorry.

8 MS. TRZAKOMA: No. I appreciate that.

9 So we're not seeking to boil the ocean.

10 We also have requested unredacted -- unredacted
11 transcripts when the Attorney General put the certain witnesses
12 on the record, they then -- they then made public the
13 transcripts of those interviews, some of them have been
14 redacted. And we know that some of the redacted information
15 through our -- through discovery in trooper 1 includes
16 information that's highly relevant to the -- highly relevant
17 context to those transcripts and I don't know -- I would have
18 to look and see exactly how many transcripts there are, but,
19 again, that is not terribly voluminous.

20 THE COURT: So does Mr. Cuomo have any unredacted
21 transcripts?

22 MS. TRZAKOMA: We do not.

23 So, you know, it's a fairly limited universe of
24 information, and, yet the Attorney General's Office has thrown
25 up every conceivable road block to prevent us from obtaining

O58UBENC

1 that information including making a sovereign immunity argument
2 that, so far as we are aware, prior to the Attorney General's
3 Office making that argument in trooper 1, it never made that
4 argument to block a federal district court subpoena.

5 And, you know, that -- the fact that the Attorney
6 General herself said that she would make all of this
7 information public and she didn't, we think that's appalling.
8 But even more appalling is that the AG is hanging her hat on a
9 state's rights argument, sovereign immunity from federal
10 discovery subpoenas, an argument that is currently being used
11 to block civil rights -- discovery in civil rights cases. The
12 fact that the Attorney General would prefer to completely upend
13 discovery in all manner of federal lawsuits by finding that
14 states and state agencies are completely immune from federal
15 subpoenas really says a lot about the lengths to which the
16 Attorney General's Office will go to avoid disclosing those
17 documents to us.

18 THE COURT: To just get away from the hyperbole a
19 little bit, if you could just focus here. Obviously, the case
20 that's closest to this one is *Felix* decided by Judge Locke, my
21 colleague across the river. Why does that not apply here?

22 MS. TRZAKOMA: *So we think Felix* was wrongly decided.
23 As explained in our briefing, we think there is no basis for
24 concluding that a subpoena issued pursuant to Rule 45 is a suit
25 for purposes of -- for purposes of the state sovereign

O58UBENC

1 immunity, and that has support in many -- in many cases across
2 the country. There is -- there is *Felix* and there is *Russell*
3 out of the Fifth Circuit. So *Felix* -- *Russell* came first, and
4 then the Attorney General's Office pushed that argument in the
5 *Felix* case.

6 THE COURT: So subpoenas --

7 MS. TRZAKOMA: So I think it was wrongly decided.

8 THE COURT: Understood. So a subpoena is issued and a
9 party is expected to respond. What happens next if the party
10 does not respond?

11 MS. TRZAKOMA: What happens next is -- so it's a
12 little -- and I will say, I've been rereading the Attorney
13 General's briefs, and it's unclear to me what their theory of
14 sovereign immunity is here.

15 THE COURT: I'm trying to focus you on just what
16 happens in the ordinary course if you serve a subpoena on
17 somebody and they don't comply. What does the party that's
18 serving the subpoena, what do they do next?

19 MS. TRZAKOMA: The party serving the subpoena pursuant
20 to Rule 45 has the right so the subpoena is, by federal law, a
21 demand for documents. If the federal law is not complied with,
22 then there is a -- a right to enforce --

23 THE COURT: Right.

24 MS. TRZAKOMA: -- that law.

25 THE COURT: Through a motion.

O58UBENC

1 MS. TRZAKOMA: Through a motion.

2 THE COURT: Right.

3 MS. TRZAKOMA: Through a -- through an enforcement --
4 a motion to compel.

5 THE COURT: And the motion results in a court order.

6 MS. TRZAKOMA: An order.

7 THE COURT: Correct.

8 MS. TRZAKOMA: Direct --

9 THE COURT: If somebody doesn't comply with a court
10 order, what remedies do you have?

11 MS. TRZAKOMA: Well, it's what remedies which your
12 Honor has, which is contempt.

13 THE COURT: But you would need to file a motion
14 seeking to hold the person in contempt.

15 MS. TRZAKOMA: Yes. That's right.

16 THE COURT: And then the result of that is sanctions,
17 monetary or nonmonetary, correct?

18 MS. TRZAKOMA: That is what the rules provide for,
19 yes, your Honor.

20 THE COURT: So how is that not like a suit that would
21 both require the Attorney General, a state agency, to appear
22 and defend and also potentially require payments from the New
23 York State Treasury?

24 MS. TRZAKOMA: So there are -- it is not suit in the
25 sense that sovereign immunity has focused on whether there's --

O58UBENC

1 it's seeking economic relief and a suit -- so under *Ex parte*
2 *Young*, for example, federal courts can compel compliance with
3 federal law. That is -- that is a century plus of law.

4 THE COURT: Yes.

5 MS. TRZAKOMA: So federal courts have the authority to
6 compel compliance with the law, and that includes the authority
7 to impose -- to hold parties in contempt and impose sanctions,
8 and that isn't -- that is -- that is clear law. This Court
9 could do it. And if -- if there's a violation of this Court's
10 order, a violation of a federal court law, this Court has the
11 authority to hold the state in compliance.

12 THE COURT: We're skipping over *Ex parte Young*, we'll
13 get to it, but you cite, Mr. Cuomo cites, I think it's the
14 Rules Enabling Act as the federal law that the Attorney General
15 is not in compliance with. Is there any Second Circuit,
16 preferably but even any court that's recognized the Rules
17 Enabling Act as a predicate federal law violation on which an
18 *Ex parte Young* argument could be made?

19 MS. TRZAKOMA: Well, I think there are -- I mean,
20 there are a lot of -- there are -- it is inherent in the
21 structure of our federalist system that this Court, the federal
22 court, has the obligation and the authority to administrator
23 justice in particular cases, and the way that it administers
24 justice is through the federal Rules of Civil Procedure, which
25 have the force of law. They have the force of federal law.

O58UBENC

1 THE COURT: I tell that to people regularly and they
2 ignore me, but I'm glad you're willing to say it on the record.

3 MS. TRZAKOMA: They do have -- they are -- it is the
4 only way that this Court can actually do justice, is by
5 enforcing the federal laws.

6 And so I think -- in the *Michigan Corrections*
7 *Organization v.* -- which is a Sixth Circuit case, parties can
8 use *Ex parte Young* to seek orders enforcing procedural rules
9 flow from the Rules Enabling Act. So that is one case.

10 But I don't think there's any reason to distinguish
11 the Federal Rules of Civil Procedure from other federal laws
12 that states, along with other parties, are obligated to comply
13 with.

14 THE COURT: I'm not suggesting that there should be a
15 distinction made. I'm just curious whether any Court has
16 recognized in the context of a violation -- noncompliance with
17 the Federal Rules of Civil Procedure and/or the Rules Enabling
18 Act would recognize that as a predicate for then going to the
19 down the *Ex parte Young* road.

20 MS. TRZAKOMA: So I think that's cited in our -- in
21 our briefs. It's 744F.3d 895.

22 THE COURT: That's the Michigan case?

23 MS. TRZAKOMA: That is the Sixth Circuit case.

24 THE COURT: 744F.3d?

25 MS. TRZAKOMA: 89 2014.

O58UBENC

1 THE COURT: Thank you.

2 MS. TRZAKOMA: Thank you.

3 THE COURT: What about any Second Circuit authority
4 applying *Ex parte Young* in the context of a subpoena at all?

5 MS. TRZAKOMA: Sorry. As we're aware, there is none,
6 and it may be because states routinely comply with federal
7 district court subpoenas. So as far as I know, there is none.

8 The Attorney General's Office has relied heavily, as
9 you may be aware, on the *EPA* case. That case is
10 distinguishable in two respects. And I think it's when I was
11 getting to that I'm a little confused about what the Attorney
12 General's argument is. This is why. The *EPA* case involved
13 a -- a federal district court subpoena to a federal agency.
14 And the question -- and the subpoena itself -- so in *Russell*
15 and in *Felix*, the theory is that the subpoena, not the
16 enforcement proceeding, but the subpoena itself is -- infringes
17 on state sovereign immunity. And in *EPA*, the subpoena itself
18 was not the infringing thing because it was federal -- federal
19 district court to federal agency, but instead it was the
20 enforcement, the Court held that the enforcement proceeding was
21 a judicial proceeding for purposes of sovereign immunity.

22 THE COURT: Okay. But are we here? Are we already
23 there?

24 MS. TRZAKOMA: No. But here's the problem: In *EPA*
25 there's -- under -- if there's a federal subpoena to a federal

O58UBENC

1 agency, there is a process under the *EPA* to enforce that
2 subpoena. So it doesn't leave the federal district court
3 without a remedy or an ability to enforce the subpoena. There
4 is a remedy. And there is also a remedy when the subpoena is
5 to a state. And that remedy is through *Ex parte Young*.

6 THE COURT: Well, why isn't the remedy FOIL?

7 MS. TRZAKOMA: FOIL is not a substitute -- so, first
8 of all, this Court does not control the FOIL process --

9 THE COURT: I totally understand, but I'm just saying,
10 Mr. Cuomo, in terms of his remedies, and he's, as I understand,
11 is pursuing them, I'll ask you more about that in a minute, but
12 FOIL does exist, and that is way for getting discovery, getting
13 documents from a state or a state agency.

14 MS. TRZAKOMA: So there are a lot of exceptions to
15 FOIL that wouldn't apply in the context of a federal litigation
16 where there's a protective order. So it is not remotely a
17 complete remedy. But, in addition, in terms of this Court
18 being able to administer justice pursuant to the federal rules
19 which require speedy, time -- you know, time efficient and cost
20 efficient, having parties have to go through the FOIL process
21 is -- so it's going to result in woefully incomplete
22 productions, a process that is -- takes forever. We served our
23 FOIL requests for -- on the Attorney General many, many months
24 ago. We have barely gotten any responses. And we did file an
25 Article 78 proceeding that the AG's office now says is

O58UBENC

1 potentially moot because they did produce some documents. So
2 it's just -- it is not even close to a substitute for obtaining
3 discovery in a federal lawsuit.

4 THE COURT: Okay. So where are we -- the big issue
5 that I have to decide is whether this subpoena and/or the
6 motions that we're in right now is a suit as the founders
7 contemplated it at the time the 11th Amendment was adopted.
8 And it does say suit and equities. So it's not just a suit for
9 damages. It can be one seeking equitable remedies.

10 So where I have to get back to is in the minds of the
11 founders in the late 1700s, and they were -- the concept that
12 they had was that the crown could not be sued, the crown could
13 not be haled into court.

14 So you cite in your papers some cases that involve
15 subpoenas around that time. As best as I can tell, they're
16 written in sort of that old English that we all struggled with
17 in law school, or at least I did, they don't appear to be
18 states themselves. One looks like it was to a county clerk.
19 One looks like it was to some kind of a secretary. I can't
20 tell who that person was affiliated with.

21 So my question is: Are there cases from the founding
22 that recognize subpoenas either subpoenas to the crown that the
23 king, King George, could have received a subpoena and been
24 required to comply with it, or to any kind of a state entity
25 around the time of the founding?

058UBENC

1 MS. TRZAKOMA: There are, your Honor. And I would --
2 I would -- we can do supplemental briefing on this issue. We
3 tried not to get -- we had 25 pages, as you know. I apologize
4 for all the footnotes. We were trying to cram it all in. We
5 did not do the, "here is what was in the founders' heads." But
6 I will say that subpoenas were not -- you know, that there --
7 that there have been processes to obtain evidence going back to
8 the founding of this country, and the founder -- the most
9 important principle that our country was founded on is
10 federalism and supremacy. And the idea that this -- that if --
11 if an Article 3 Court, which is the federal district court
12 through it -- by which these subpoenas were issued does not
13 have the authority over state to compel documents that are --
14 that is a very slight infringement on the Attorney General's
15 sovereignty. This is not situation where we are even -- we're
16 not even seeking documents that go to the business of the
17 Attorney General. These are documents that go to the business,
18 three, four, five years ago of the executive chamber. So it's
19 not -- the infringement is slight, and I do think that the case
20 law is -- what you see in the case law is Courts are trying to
21 balance state sovereign immunity butt up against federalism
22 principles. And what I think we have from the Attorney
23 General's briefs. And maybe even *Russell* is an effort to just
24 put on blinkers and ignore the federalism principles that led
25 the Supreme Court to say an *Ex parte Young*, yeah, yeah, state

O58UBENC

1 sovereign immunity, but prospective relief is fine. And in
2 that regard I do not understand the Attorney General's argument
3 that what we are seeking is retrospective relief. We're not
4 seeking for this Court to, you know, to hold a past violation.
5 We are asking for this Court to direct compliance with a
6 federal subpoena which flows from federal law. That's classic
7 prospective relief.

8 And so, if it's not -- if the Court were to find it's
9 a suit, which I don't think it is a suit, it is -- we are not
10 suing the Attorney General. We are not trying to bring a claim
11 against the Attorney General. We are not trying to get money
12 from the Attorney General. All we're trying to do is get
13 documents.

14 And it really is the case that if the Attorney
15 General's position prevails, all sorts of litigants in this
16 courthouse are going to have a very difficult time obtaining
17 documents to be able to prove their claims. And let me give
18 you an example. Let's say that instead of Governor Cuomo
19 trying to get documents from the executive chamber or from the
20 Attorney General, it was Ms. Bennett trying to get documents
21 from her former employer to prove her claims of sexual
22 harassment. Under the Attorney General's theory, Ms. Bennett
23 would be shut out. The executive chamber could say, sorry,
24 we're not turning those over. That's what's at stake here.
25 And it is -- I think it is -- it is novel, it is -- there is no

O58UBENC

1 Second Circuit -- I mean, to your Honor's point, there is no
2 Second Circuit case that says they can do this. And there's
3 not even a District Court case in this district that says they
4 can do it.

5 And I -- to line yourself up with the Fifth Circuit
6 which is so out of step with our circuit, I just -- I find that
7 really, quite shocking, actually.

8 THE COURT: I'd like to pivot to talk about waiver for
9 a bit. So even assuming that sovereign immunity applies, you
10 cite in the section of the briefs the opening brief on waiver,
11 there is a citation to several cases that involve, I think,
12 tribal immunity, but I'm more interested in cases that talk
13 about what constitute waiver and state sovereign immunity
14 context. Are there any that you can specifically point me to
15 in the context of litigation conduct as a waiver.

16 MS. TRZAKOMA: Yes. So we do cite to the recent Court
17 of Appeals decision in *Henry*.

18 THE COURT: Right.

19 MS. TRZAKOMA: So waiver is a creature of state law.
20 So we look to New York law. And I think the *Henry* decision
21 makes clear that state -- a state with waive its immunity for
22 its litigation conduct, and I think that has happened here.
23 And let me just tell you why: It -- it has to do with the
24 Attorney General's decision-making. So there are two potential
25 sources of waiver. The first one is that the Attorney General

O58UBENC

1 may have disclosed certain investigative materials to the
2 Department of Justice and to the Eastern District of New York.
3 As your Honor may have read, the Attorney General's Office has
4 declined to state whether it did or it didn't turn anything
5 over.

6 So it has not remotely met its burden that it kept
7 anything confidential, and the burden is on the Attorney
8 General's Office to say that they did. Instead, they have --
9 they acknowledge that they have turned things to five district
10 attorney's offices without telling us or the Court what those
11 materials are. So we have materials from one district
12 attorney. I don't know what was turned over to others. And
13 that's a waiver that goes not only to sovereign immunity but to
14 the arguments about privilege. But, in addition, they
15 acknowledge that there were requests from the Department of
16 Justice and from the Eastern District of New York for
17 investigative materials. And in Ms. Longley's declaration --

18 THE COURT: When you say Eastern District of New York,
19 you're talking about --

20 MS. TRZAKOMA: U.S. Attorney's Office.

21 THE COURT: -- the U.S. Attorney's Office?

22 MS. TRZAKOMA: U.S. Attorney's Office.

23 THE COURT: Not Judge Merkl?

24 MS. TRZAKOMA: Not Judge Merkl. The U.S. Attorney's
25 Office.

O58UBENC

1 So that is -- that statement about -- is in
2 paragraph 27 of Ms. Longley's declaration, ECF 225, in which
3 she acknowledges that on or about August 13, 2021, the U.S.
4 Department of Justice and the U.S. Attorney's Office for the
5 Eastern District of New York jointly requested certain OAG
6 materials in connection with their own investigation into
7 whether the executive chamber led by former Governor Andrew
8 Cuomo engaged in a pattern or practice of sexual harassment and
9 a pattern or practice of retaliation in violation of federal
10 law. And here's the key, to the extent the OAG provided
11 materials in response, if any, those materials were subject to
12 the same terms of a confidentiality agreement that did not
13 protect against any waiver and certainly not against any waiver
14 of sovereign immunity.

15 THE COURT: Page 4.

16 MS. TRZAKOMA: To say the least. And I do hope the
17 Court will inquire because, if not a total waiver, then at
18 least it's a waiver as to anything that was turned over.

19 But the other -- but the litigation conduct is also
20 troubling, and here's -- as your Honor knows, I guess, I just
21 want to go back in time. This lawsuit followed the trooper 1
22 lawsuit.

23 THE COURT: Yes.

24 MS. TRZAKOMA: And let me just find my notes on this.

25 And I -- when we're talking about litigation conduct

O58UBENC

1 waiver, I am talking about a strategic decision by the Attorney
2 General's Office to waive its sovereign immunity for
3 affirmative and offensive purposes. So the trooper 1 complaint
4 came first, about a year ago, I guess last July, trooper 1
5 Court -- and there were, as your Honor knows, there was motion
6 practice.

7 THE COURT: Right.

8 MS. TRZAKOMA: Both a motion to compel, cross-motion
9 for quash. In July of last year, the trooper 1 Court denied
10 our motion for compel, our original subpoena was very broad
11 because the trooper -- the trooper's complaint was very broad.
12 So the Court denied our motion to compel, but did not rule on
13 the motion to quash. And that's important because at that
14 moment, there's no motion -- the motion to compel was denied,
15 there's no order compelling compliance, the AG could have
16 withdrawn its motion to quash, but it did not. Instead, the
17 Attorney General pushed on with its motion to quash, which the
18 trooper 1 Court determined it could not resolve without
19 reviewing the underlying documents. So the trooper 1 Court, a
20 federal court that the Attorney General says has no authority
21 to compel the AG to produce anything, ordered the Attorney
22 General to produce documents, the very documents that we are --
23 that we are seeking the Court to compel.

24 By the time the trooper 1 Court issued that order to
25 compel or issued that order to produce documents, we had

058UBENC

1 already served the Attorney General with the subpoena in this
2 case. And we had made a request for materials under FOIL. At
3 that moment, when it was ordered, when the AG was ordered to
4 turn over documents in trooper 1, the AG had options. The
5 Attorney General could have sought a stay of trooper 1 -- of
6 trooper 1's Court order. The Attorney General could have
7 appealed that order but mostly, or also, the Attorney General
8 could have withdrawn its motion to quash and avoided having to
9 turn over those documents to the federal court.

10 But the AG did none of those things. Instead, the AG
11 decided to comply with the Court's order. And I believe that
12 the Attorney General wanted the trooper 1 Court, not this
13 Court, not the state court in the Article 78 proceeding, wanted
14 the trooper 1 Court to decide its privilege claims. In fact,
15 you'll recall, earlier this year, at the end of last year and
16 earlier this year, the Attorney General's Office practically
17 begged your Honor to stay this proceeding, to defer to
18 Judge Merkl. Why did the Attorney General's Office comply with
19 an order that it says -- that it -- that infringes on its
20 claimed sovereignty to the same extent as the subpoena? I
21 believe it's because the Attorney General thought it has -- it
22 believes it has a friendly forum over there, or perhaps the
23 Attorney General's Office preferred the procedural posture in
24 the trooper 1 case on the sovereign immunity issues.
25 Regardless, the Attorney General's Office made a deliberate

O58UBENC

1 decision to disclose documents to a federal court that it could
2 have avoided. Yes. There was an order, but the Attorney
3 General's Office did nothing to protect its rights, its claimed
4 rights.

5 And what's even wilder to me is that the Attorney
6 General's Office recently agreed in trooper 1 to provide the
7 trooper 1 Court with even more briefing and more information
8 about its privilege assertions. The Court asked, and the
9 Attorney General's Office agreed to provide, color-coded
10 versions of the interview memos to identify exactly what
11 privileges were being asserted with respect to what material,
12 that the Attorney General's Office agreed to undergo --
13 undertake this painstaking exercise boggles my mind, especially
14 considering their arguments of burden, the burden of having to
15 redact. They're going to color-code those documents. Why not
16 refuse the Court's directions if the attorney's office has
17 sovereign immunity? I do believe they've waived through their
18 conduct.

19 THE COURT: The couple of waiver cases that you cite
20 in your brief that involve production of documents, where a
21 Court has recognized the production of documents to be a waiver
22 of both of those I think are outside this circuit. Are there
23 any cases from within the Second Circuit where a Court has
24 deemed production of documents to whomever, to the third party
25 or another outside of the party who is requesting them to be,

O58UBENC

1 to constitute waiver?

2 MS. TRZAKOMA: We have not but to the extent the
3 sovereign immunity that is being claimed is object all fours
4 with the disclosures, which it is, I don't see how that is not
5 a waiver.

6 THE COURT: Thank you.

7 MS. TRZAKOMA: I'm happy to proceed with the other
8 privileges that we -- the other waiver.

9 THE COURT: Yes, to the extent you can.

10 I am mindful of the time, so maybe if you could wrap
11 up in the next five minutes or so.

12 MS. TRZAKOMA: Okay. I'll just touch briefly --

13 THE COURT: Frankly, I don't know that we need to
14 spend a lot of time on privilege because I think, obviously,
15 sovereign immunity is such a threshold issue, and if then I'm
16 going to get to privilege, I think I need privilege logs. So
17 I'm not sure we need to spend a lot of time on that today.

18 MS. TRZAKOMA: That is fine, your Honor, because the
19 privilege -- I was just going to say the Attorney General bears
20 the burden to show that privilege attaches to documents, and it
21 has not shown -- it has not met that burden with respect to
22 any, much less all, of the documents.

23 THE COURT: I don't think I've ever upheld an
24 assertion to privilege without, at a minimum, looking at a
25 privilege log, let alone doing an in-camera review as well.

O58UBENC

1 There are other Courts who may have, but at least my precedent
2 in this courtroom is that I need to do that review. So, that's
3 why I'm just saying I don't know that you need to spend a lot
4 of time on those points.

5 MS. TRZAKOMA: That's fine, your Honor.

6 I'll just -- I'll just -- I do want to say that there
7 have been assertions of attorney-client and work-product
8 protection over these interview memos. They are not
9 communications between an attorney and a client. There are
10 communications between the Attorney General's Office,
11 investigators, and employees or former employees of the
12 executive chamber. There is no attorney-client relationship.
13 These are not work product documents. They were not prepared
14 in anticipation of any litigation. They were prepared for the
15 purpose of conducting an investigation and issuing a public
16 report. And to the extent there were -- that the declarations
17 that have been submitted reference vague suggestions of
18 potential disputes that could arise, your Honor's decision in
19 Brook is exactly on point, documents that would have been
20 created, whether or not litigation was anticipated, are not
21 protected by work product immunity. That is plainly the case
22 for the interview memos, which would have been -- I mean, the
23 potential disputes that were arising were arriving as a result,
24 arguably, the interview memos. There's no nexus between the
25 interview memos being prepared and those potential disputes.

O58UBENC

1 And I'm -- you know, I also will conclude by saying,
2 you know, the other privileges, like law enforcement,
3 deliberative process are just inapplicable here, and the
4 Attorney General office also goes to great lengths to suggest
5 that information should be protected out of confidentiality
6 concerns. They're vague, generalized concerns, apparently,
7 applying to everyone, even those who, you know, probably had
8 nice things to say about my client, and those arguments really
9 have no place here where there's a protective order where the
10 events are years ago and where my client hasn't been in office
11 for a long time, but at the end -- and there really is no basis
12 for the Attorney General's Office to claim a concern about
13 retaliation. Governor Cuomo is entitled to defend himself.
14 He's entitled to challenge the allegations against him. He's
15 entitled to obtain evidence to disprove Ms. Bennett's claims,
16 and most importantly, Governor Cuomo and the public are
17 entitled to the truth.

18 THE COURT: Thank you.

19 Mr. Amer? Ms. Longley?

20 MR. AMER: Thank you, your Honor.

21 Let me just say at the outset we had, with the Court's
22 permission, would want to split the argument between sovereign
23 immunity, and Ms. Longley taking privilege issues.

24 THE COURT: That's fine.

25 MR. AMER: So, on sovereign immunity, the subpoena in

O58UBENC

1 this case should be quashed for two reasons: One, under Second
2 Circuit precedent, the subpoena or the enforcement of the
3 subpoena, I don't think it matters which one you look at, is a
4 suit that triggers sovereign immunity; and, second, New York
5 sovereign immunity has not been waived.

6 We think the Second Circuit's decision in *EPA v.*
7 *General Electric* is controlling on this issue, qualify and
8 compels the Court to find that the subpoena here is a suit that
9 triggers sovereign immunity? In the *EPA* case, the Second
10 Circuit spelled that a subpoena served on the *EPA*, which was
11 not a party to the case, was a suit for purposes of triggering
12 sovereign immunity. And I'm just going to read to you the -- I
13 think the pivotal section of the --

14 THE COURT: I've read it. You don't need to reread it
15 to me.

16 MR. AMER: The point of that provision which cites to
17 the *Dugan* case is to find that because enforcement subpoena
18 could compel the government to act, it triggers sovereign
19 immunity, and whether that government entity is a state agency
20 or a federal agency is completely irrelevant to the *Dugan* test.
21 It simply doesn't matter for purposes of applying the *Dugan*
22 language that the Second Circuit relied on, whether the
23 government is a state agency or a federal agency.

24 THE COURT: Right. But if we're compelling the
25 government to act, don't we land in *Ex parte Young* territory

O58UBENC

1 where the Supreme Court has said that it is permissible?

2 MR. AMER: We don't think *Ex parte Young* possibly
3 applies in any way, shape, or form to the facts of this case.
4 I can -- let me get right to *Ex parte Young*, but I did want to
5 circle back and just review for you the cases that we think
6 support our position about *EPA* and *Dugan*. But on *Ex parte*
7 *Young*, it's well accepted that for the *Ex parte Young* exception
8 to sovereign immunity to apply, you need to have an ongoing
9 violation of federal law, and we just don't have that here --

10 THE COURT: Well, what Ms. Trzaskoma says that you're
11 not complying with the subpoena, which is a valid federal court
12 order in effect, and, you know, we're heading down the road of
13 noncompliance, if I order you to compel and you're not and --
14 and you don't comply, or if I order you to produce and you then
15 don't apply -- don't comply, then you're in violation of a
16 Court order, which is a violation of federal law.

17 MR. AMER: So, with all due respect, that logic is
18 deeply flawed for a couple of reasons. First of all, I think
19 the argument is not that we're not complying with the subpoena,
20 but we're not complying with the federal rules. And the answer
21 to that is that we are complying with the federal rules. The
22 federal rules set out the procedure for opposing a subpoena.
23 It's not self-executing. You have the right, as the recipient
24 of a federal subpoena, to interpose objections, which we did.
25 They may have -- they might have had an argument had we just

O58UBENC

1 thrown the subpoena in the garbage and not responded to it at
2 all, but we didn't do that.

3 THE COURT: I think they treated what you're doing as
4 the equivalent.

5 MR. AMER: Well, it's not. We have certain right
6 under the federal rules to oppose --

7 THE COURT: Of course.

8 MR. AMER: -- that's what we've done. so we are, in
9 fact, complying with the federal rules.

10 THE COURT: What if I grant the motion to compel and
11 the Attorney General then ignores it, aren't we back in the
12 same place?

13 MR. AMER: No. Because this Court has no authority to
14 grant the motion to compel because we are immune from this
15 Court's exercise of jurisdiction over the subpoena. That's
16 what it means to be immune from suit. For this Court to issue
17 an order compelling us to comply with the subpoena would
18 violate our sovereign immunity.

19 So, that sort of gets to the other problem with their
20 *Ex parte Young* argument, which is, it's circular. In every
21 instance where the Court applies *Ex parte Young*, there is a
22 preexisting, ongoing violation of federal law that the *Ex parte*
23 *Young* lawsuit is then brought to remedy.

24 THE COURT: Okay.

25 MR. AMER: We don't have that preexisting violation of

O58UBENC

1 federal law. We just have a subpoena that they, in a circular
2 way, argue serves as both the means to bring us into court and
3 the source of the ongoing violation of federal law.

4 I would, although it's not in the Second Circuit, I
5 would refer the Court to a decision that does discuss, at least
6 in the one we were able to find, that does discuss why *Ex parte*
7 *Young* is not applicable to a subpoena enforcement action. It's
8 *Estate v.* -- it's *Estate of Gonzalez v. Hickman* out of --

9 THE COURT: Yes, which a subsequent case *Allen*
10 disagreed with. So I'm not sure -- there's another case from
11 that same district later that says that cast doubt on *estate of*
12 *Gonzalez*.

13 MR. AMER: Although I think the why the reason the
14 cast doubt on *Gonzalez* is because, in the Ninth Circuit, a
15 subpoena is not deemed to be a suit for purposes of triggering
16 sovereign immunity, and so to that, extent it conflicts with
17 Second Circuit case law.

18 THE COURT: Okay. So Footnote 13 of Mr. Cuomo's
19 opening brief has a dozen cases, at least, I think, where
20 federal courts enforced subpoenas against state agencies and
21 officials. So how do you -- what was going on there? Did the
22 Courts in those cases not have -- you're saying that they were
23 violating sovereign immunity by requiring those state agencies
24 and officials to comply with those subpoenas?

25 MR. AMER: No. Let me go through some of those cases

O58UBENC

1 and explain why they're distinguishable. There's maybe one
2 case that I can't distinguish, and I would just chalk it up to
3 a circumstance where the issue was never raised.

4 But the *Freeman v. Rochester Psychiatric Center* Case,
5 the plaintiff served a subpoena on the New York State
6 Department of Labor to obtain a copy of his own unemployment
7 records. The Department of Labor received from the plaintiff a
8 signed authorization for those records, and the Department of
9 Labor determined that it was required under state law to
10 provide those records deeming that state law to have waived
11 sovereign immunity. I would also point out, and this sort of
12 goes to Ms. Trzaskoma's example of Ms. Bennett seeking to get
13 from the executive chamber her employment records. The state
14 routinely provides employees of state agencies with their
15 employment records through FOIL, if they are provided with a
16 duly executed authorization.

17 THE COURT: So you're saying the interview memos are
18 Ms. Bennett's employment records?

19 MR. AMER: No. They're not. I think Ms. Trzaskoma
20 gave us an example of why it's problematic to adopt our
21 position, the example of Ms. Bennett seeking her own employment
22 records in this case, and my answer is that that's the type of
23 record that would routinely be provided under FOIL.

24 THE COURT: But she couldn't get emails, her emails,
25 for example you're saying?

O58UBENC

1 MR. AMER: No. I'm saying she would have to go
2 through FOIL, which is the statutory waiver of sovereign
3 immunity that New York has agreed to.

4 *Screen v. Quality Protection Services* case, that's
5 another example of a case where there was an authorization to
6 obtain personnel records from the New York State Department of
7 Labor. So I think that's the same as the *Freeman* case. The
8 *Pierce v. Devon* case, that case involved a defendant
9 correctional officer who was a party to the case, and it's
10 entirely unclear from the decision whether or not the documents
11 were within that defendant's custody, possession, or control.
12 So, in other words, that's a situation, which I think is
13 common, your Honor, in 1983 cases where the plaintiff names as
14 a defendant a state official, either through *Ex parte Young* or
15 in an individual capacity basis and the document production
16 goes forward because the state official who has custody,
17 possession, or control of records is a named party and you can
18 get them through party discovery, which is --

19 THE COURT: I thought almost all of -- I thought I
20 read them all as involving subpoenas, not party requests.

21 MR. AMER: I think if you read the decision in *Pierce*
22 *v. Devon* it's clear that there were correctional officers who
23 were defendants, and it's unclear whether the Court is saying
24 you need to provide the documents because you're a party to
25 this case versus I'm going to order them to be provided through

O58UBENC

1 the subpoena.

2 THE COURT: If you're party, you don't need Rule 45.

3 MR. AMER: I understand that. I think there was a
4 subpoena issued to DOCCS, but there was also a defendant in the
5 case who was a correctional officer, and what I'm saying is
6 it's unclear from the decision which is the avenue through
7 which the Court determined that the documents should be
8 provided.

9 *Lynch v. the City of New York*, which is in that same
10 footnote, I read that to be nothing more than a requirement
11 that the parties meet and confer. It says nothing more than
12 that.

13 THE COURT: Well, but, under your theory of
14 federalism, I could not even order you to meet and confer with
15 Ms. Trzaskoma about the subpoena. You're saying the subpoena
16 stops at the door. She can't even come in the federal
17 courthouse with that subpoena and I can't -- I can do nothing
18 about it. So how did that Court have authority to direct the
19 state agency to meet and confer under your theory?

20 MR. AMER: Your Honor, I don't think complying with
21 the rules to get us to a motion to quash would be sufficient to
22 cross over this line. I think it's when the Court acts on the
23 subpoena to compel the production of document that we have a
24 problem with sovereign immunity.

25 And I also think in the *Montesa v. Schwartz* case, that

O58UBENC

1 involved a subpoena served on New York State Education
2 Department, and it involved the Family Education Rights Privacy
3 Act or FERPA and whether or not the documents being sought from
4 the Education Department under FERPA was an abrogation of state
5 sovereign immunity.

6 All of this is to say, by the way, your Honor, that I
7 don't think that what happened in prior cases where this
8 sovereign immunity defense may not have been issued -- may not
9 have been raised and was not an issue, in any way precludes us
10 from raising the sovereign immunity issue in this case.

11 THE COURT: Right? But you also tell me that it's not
12 waivable.

13 MR. AMER: That's true. It is not waivable.

14 THE COURT: So how do you speak to those cases where
15 obviously the state official waived it?

16 MR. AMER: It's not waivable by litigation conduct.
17 It is of course waivable by legislation, and the New York --
18 and New York has waived it by legislation. New York enacted
19 the Court of Claims Act. New York has enacted FOIL. So the
20 point of the argument --

21 THE COURT: I thought *Henry* said that it could be
22 waived by litigation conduct.

23 MR. AMER: So we think the other side seriously
24 misreads *Henry*.

25 THE COURT: You're being nice and pointing out Ms.

O58UBENC

1 Trzaskoma. I read it the same way she does.

2 MR. AMER: Let me tell you why *Henry* --

3 THE COURT: Tell me why I'm wrong, Mr. Amer. I'd love
4 to hear that.

5 MR. AMER: The reason why *Henry* does not abrogate New
6 York's rule that you can't waive sovereign immunity by
7 litigation conduct is because the Court in *Henry* recognized
8 three different types of sovereign immunity. It recognized a
9 state sovereign immunity from suit in federal court; it
10 recognized a state's sovereign immunity from litigation in
11 other state's courts, which it called interstate sovereign
12 immunity; and it recognized state sovereignty of a state in its
13 own courts, which would be the sovereign immunity here, which
14 is New York's immunity from suit in New York's own courts. The
15 *Henry* case dealt solely with interstate sovereign immunity.
16 That case was about whether New Jersey Transit Authority could
17 be subject to suit in the courts of New York. And the Court
18 held that interstate sovereign immunity is akin to personal
19 jurisdiction, and so it can, in fact, be waived, but the Court
20 distinguished the case before it from a circumstance involving
21 sovereign immunity of a state in its own courts, and the Court
22 went on to note that the result in that type of case is
23 distinguishable from the case that was before it because New
24 York's immunity from suit in New York courts is a function of
25 legislation, the New York Court of Claims Act, and it involves

O58UBENC

1 the scope of the Court of Claims' jurisdiction. So I would
2 submit that based on the Court's distinguishing these different
3 types of sovereign immunity, it was saying that New York's
4 immunity to suit in New York is still a function of subject
5 matter jurisdiction which is not waivable --

6 THE COURT: Okay. But you're familiar with the
7 Foreign Sovereign Immunity's Act, I presume. It doesn't
8 probably come up for you often, but the Second Circuit has
9 clearly held that foreign sovereign immunity is waivable by
10 litigation conduct. The Court is also -- Courts have also held
11 that tribal sovereign immunity is also waivable by litigation
12 conduct.

13 Why isn't the same rule, why are states different,
14 that litigation conduct cannot waive sovereign immunity?

15 MR. AMER: Because, as the Second Circuit has
16 recognized, the question of whether sovereign immunity is
17 waivable, state -- broad state sovereign immunity is waivable
18 is a function of state law, not federal law. So this Court
19 needs to look to the law of New York to determine whether New
20 York sovereign immunity is waivable by litigation conduct.

21 And I would ask the Court to look again at pages 372
22 to 373 of the *Henry* decision. It's the portion of the decision
23 that distinguishes the two different types of sovereign
24 immunity that I've been talking about, and I think it's clear
25 from reading that portion of the decision that while the Court

O58UBENC

1 is saying interstate sovereign immunity can be waived by
2 litigation conduct, that is not the case with respect to New
3 York's own immunity within the courts of New York.

4 THE COURT: But why weren't we -- why isn't this more
5 like interstate immunity because you're in effectively the
6 court of a different sovereign? New York versus New Jersey is
7 somewhat -- is not perfectly analogous but it's more like
8 New York versus federal court because you're in the court of a
9 different sovereign. So why are you saying that -- I'm still
10 not following why you think it's special.

11 MR. AMER: So this raises a very important point, your
12 Honor, and it's something that you need to be cognizant of when
13 you're looking at a lot of these cases, which is many of these
14 cases turn solely on 11th Amendment immunity. We are not
15 relying solely on 11th Amendment immunity.

16 THE COURT: I know.

17 MR. AMER: And it's the broader state sovereign
18 immunity which is the immunity that New York would have even if
19 a New York court, state court, that is the basis for our
20 sovereign immunity argument, and we think it's clear, based on
21 *Henry* that the only -- that it's only abrogating the New York
22 rule about the non-waivability of sovereign immunity through
23 litigation conduct with respect to interstate sovereign
24 immunity and it -- and it is drawing an analogy to personal
25 jurisdiction, and it's making a distinction, a distinction that

O58UBENC

1 this Court should recognize between interstate sovereign
2 immunity, which is not what we're talking about here, and New
3 York's broader sovereign immunity in the courts within the
4 state of New York, federal, or state. And the section that I
5 just referred you to, 372 to 373, speaks to this very issue and
6 makes clear that the Court is not suggesting that New York's
7 own sovereign immunity within the courts of New York is
8 anything other than what the rules currently provide, which is
9 that it's subject matter jurisdiction that is not waivable by
10 litigation conduct.

11 I do want to just mention --

12 THE COURT: Let me just get to the heart of this.

13 MR. AMER: Yes.

14 THE COURT: Would you -- did the Attorney General
15 produce to the Department of Justice in Washington or to or the
16 U.S. Attorney's Office in the Eastern District of Brooklyn --
17 in the Eastern District of New York any of the materials that
18 Mr. Cuomo is requesting here?

19 MR. AMER: I'm going to have to defer to Ms. Longley
20 because I don't know the answer.

21 THE COURT: Okay.

22 MR. AMER: All I can say thought is that whatever we
23 did produce, to the extent there was material that was
24 produced, it was produced subject to an agreement, cooperation
25 agreement between law enforcement entities that we believed

058UBENC

1 preserved all of our concerns about confidentiality and
2 privilege, and we don't see how that conduct, in any instance,
3 even -- so let me -- let me back up and say, even assuming that
4 the New York rule was you could waive sovereign immunity
5 through litigation conduct, it's clear that nothing that
6 happened here rises to that level. And I would point you to
7 the *Ghawanmeh v. Vermont* case, I think that -- you had asked
8 for a case within the Second Circuit that discusses the
9 standard for waiver by litigation conduct. That case involved
10 a suit brought against the State of Vermont, and in that case,
11 Vermont renounced in the early phases of the litigation any
12 intention to invoke the defense of sovereign immunity and it
13 proceeded to litigate the case, and then Vermont changed its
14 mind and it raised the sovereign immunity defense. And I'm
15 just going to read from the Court's decision, this is *Beaulieu*
16 *v. Vermont*, 807 F.3d 478. It's a 2015 Second Circuit decision.
17 This is at page 491: Even assuming that prejudicial product by
18 a state defendant can override state law limiting the manner in
19 which the state's general sovereign immunity may be waived or
20 abrogated, we find no such prejudicial conduct here. It is
21 true that defendants changed their strategy, and that earlier
22 invocation of Vermont's immunity might have resulted in earlier
23 dismissal sparing plaintiff some burden and expense, but there
24 is no record of duplicitous conduct by defendants or of serious
25 unfairness to plaintiffs resulting from the tardy invocation of

O58UBENC

1 immunity. The Court below ordered further discovery on the
2 sovereign immunity question and the parties had months to brief
3 it. Accordingly, we reject plaintiff's final argument that
4 defendants waived Vermont's general sovereign immunity by their
5 litigation conduct.

6 Your Honor, if Vermont, in that case, did not waive
7 its litigation conduct by renouncing the defense proceeding
8 with the litigation and then changing its mind; a fortiori,
9 there is no way that this record would support a finding of
10 waiver of sovereign immunity on litigation conduct, and there's
11 certainly no prejudice that arises from our office providing to
12 the DOJ any material from the investigation because it's not as
13 though the plaintiff here, Bennett, has anything that they
14 don't have. It's not as though it's like one of these cases
15 where a party gives material to one side of the V. and not the
16 other side of the V. So just looking at the *Beaulieu* case
17 there's just no way that anything that happened here could
18 possibly be construed as waiver by litigation conduct.

19 I'll also mention that, you know, the Second Circuit
20 recognizes, in the passage that I just read, that the whole
21 question of whether Vermont can even waive its sovereign
22 immunity by litigation conduct is one that it's not passing on
23 because it says even if you could waive by litigation conduct,
24 you haven't met the standard here, but it does recognize that
25 the question is controlled by Vermont law, not by federal

O58UBENC

1 Second Circuit precedent.

2 I also want to mention that I -- well, I did want to
3 just quickly talk about a handful of the cases that we think
4 are very pertinent here. Obviously, you mentioned the *Felix*
5 case. We think Judge Locke got it right. There's no flaw in
6 his rationale. He was compelled the same way we think this is
7 this Court a compelled under the *EPA* case to conclude that a
8 subpoena is a suit for purposes of triggering sovereign
9 immunity.

10 Judge McMahon in the *Catskill Development* case reached
11 the same conclusion with respect to a subpoena served on tribal
12 officials. We don't think there's any daylight between that
13 case and this case, that it's the same situation. It's a
14 subpoena served on an official of an entity that enjoys
15 sovereign immunity. And Judge McMahon relied on the *EPA*
16 holding based on the *Dugan* case. There are three circuit cases
17 outside the Second Circuit that all compel the result we're
18 asking for. Obviously, the *Russell* case in the Fifth Circuit,
19 tell that case involved state officials. So it's directly on
20 point. The Eighth Circuit and Tenth Circuit have both held
21 that, just like Judge McMahon held in the *Catskill Development*
22 case that subpoenas served on tribal officials triggers
23 sovereign immunity, the tribal sovereign immunity.

24 All of the cases that the other side cites that come
25 out the other way do so because either they're only dealing

O58UBENC

1 with 11th Amendment immunity and not the broader state
2 immunity, or they fundamentally disagree with the Second
3 Circuit that a subpoena is a suit for purposes of triggering
4 sovereign immunity, and the reason why they disagree is because
5 I don't think they're faithful to the language of *Dugan*. I
6 think they -- I think they -- so *Dugan* says the general rule is
7 that a suit is against the sovereign if the judgment sought
8 would expand itself on public treasury or domain, according to
9 the theory with the public administration, or 1 effect of the
10 judgment would be to restrain the government from acting or
11 compel it to act.

12 And I think a number of courts stop at the first half
13 of that sentence and look only at the effect on the state
14 treasury, and I think that's erroneous. That may be, you know,
15 some Courts view that as where you stop the analysis when
16 you're talking about 11th Amendment immunity, but clearly
17 when you're talking about state's broader sovereign immunity,
18 you have to include the second half of the *Dugan* standard, and
19 you have to look at whether or not you're going to be
20 compelling the government to either refrain from acting or --
21 from taking an affirmative act.

22 So I do think that the other cases that they cite to
23 outside the Second Circuit can't be followed because they
24 conflict with the *EPA* holding of the Second Circuit, and,
25 honestly, I think that the Second Circuit's decision in *EPA*

O58UBENC

1 compels the Court to find that we do have sovereign immunity
2 here as to this subpoena, and I don't think there's any basis
3 to hold waiver.

4 I will just quickly mention that I think the argument
5 about our position leading to some parade of horrors where
6 nobody can ever get any documents from state agencies is
7 completely overblown, your Honor. And it's overblown for four
8 reasons, I think:

9 The first reason, which I believe I mentioned, is that
10 in most Civil Rights 1983 cases, the plaintiff names as a party
11 defendant a state official either because, through *Ex parte*
12 *Young*, they're seeking some prospective injunctive relief or
13 because they named the state official in his or her his or her
14 individual capacity, which they're allowed to do, that doesn't
15 trigger sovereign immunity. And it's often the case that those
16 individuals who are named defendants are in custody,
17 possession, or control of the documents that are being sought.
18 So they are just obtainable through ordinary party discovery.

19 Second, it's often the case that state agency
20 documents are FOILable. They're not subject to any exceptions
21 to FOIL, and that's the legislative waiver that New York has
22 entered into of its sovereign immunity with respect to how
23 documents can be obtained from state agencies.

24 Third, it may be the case that there is parallel or
25 related litigation to a civil rights action in the New York

O58UBENC

1 Court of Claims. That is permitted because New York has,
2 through the Court of Claims Act, waived its sovereign immunity?
3 And so that's a circumstance where whatever documents the
4 plaintiff who has perhaps two different lawsuits, one in the
5 Court of Claims against New York State and one maybe in federal
6 court under 1983, can get whatever documents it needs through
7 the Court of Claims action that is also pending.

8 Fourth, Congress has the ability to abrogate state
9 sovereign immunity exercising proper powers, and it has done
10 so. So, for example, Title II of the ADA, Courts have read
11 that statute to waive state sovereign immunity. And in any
12 particular action or federal statute, you would need to look at
13 whether or not Courts have held that Congress has abrogated
14 state sovereign immunity. I believe Courts have held, for
15 example, that in addition to Title II of the ADA, the Voting
16 Rights Act is another example of Congressional litigation that
17 abrogates sovereign immunity.

18 So the fact is that it will be the rare case where the
19 state sovereign immunity precludes a litigant from obtaining
20 documents from the state for use in a pending litigation. It
21 would be -- it would need to be a unique case like this one,
22 where there is no state official named as a defendant who would
23 have custody, control, or possession over the documents, where
24 the documents are subject to FOIL exceptions, like privileges
25 that attach to these documents. There is no related litigation

O58UBENC

1 in the New York Court of Claims that would give the movant here
2 access to the documents, and there's no abrogation of sovereign
3 immunity by Congress.

4 THE COURT: I would like to hear from Ms. Longley.
5 I'm just mindful of the time.

6 MR. AMER: So for all those reasons, your Honor, we
7 think the Second Circuit has spoken on this issue and that your
8 Honor should follow Judge Locke's decision in the *Felix* case
9 and hold that a sovereign immunity applies and it has not been
10 waived.

11 Thank you, your Honor.

12 THE COURT: Okay. Thank you.

13 So, Ms. Longley, let's start with the question that
14 Mr. Amer left hanging which is whether the materials that the
15 Attorney General provided to the Department of Justice, any of
16 its branches, included any of the materials that Mr. Cuomo is
17 requesting here.

18 MS. LONGLEY: Your Honor, I really don't want to not
19 answer your question, but I am a little uncomfortable getting
20 into the specifics about what information may have been shared
21 with fellow law enforcement that's not already publicly
22 available, but what I can say is to echo what my colleague
23 said, if documents were shared, they were done pursuant to
24 confidentiality agreements in the context of law enforcement
25 entities working together and they were certainly not shared

O58UBENC

1 with plaintiff. They have not ever been shared with parties to
2 this litigation other than Defendant Cuomo who has gotten some
3 materials through criminal discovery.

4 THE COURT: Is there an index of what was provided to
5 the Department of Justice or a list?

6 MS. LONGLEY: I'm not aware of one.

7 THE COURT: Okay.

8 MS. LONGLEY: But, you know, I think, you know --

9 THE COURT: How would we find out what was provided in
10 way that you could -- I'm not asking for substantive answer, if
11 you're -- I wish I was getting an answer to my question, but
12 I'm just, procedurally, if I wanted to know, if this Court
13 wanted to know what was in the AG's production to the
14 Department of Justice, is there a way for that information to
15 be provided to the Court?

16 MS. LONGLEY: Perhaps, at the risk of opening
17 ourselves up to another waiver argument, I would say perhaps
18 in-camera our office could share that information voluntarily
19 perhaps, so as -- although we disagree that responding to a
20 Court order asking for an in-camera review so it can rule on a
21 motion to quash, we don't think that's waiver. Perhaps that
22 would be a way to respond. But I'm uncomfortable right now in
23 open court when it's not something that our office has publicly
24 shared and it's not something that the Department of Justice
25 has publicly shared. There are a lot of people on the phone.

O58UBENC

1 THE COURT: All right. So setting that aside, is
2 there a privilege log with respect to the materials that
3 Mr. Cuomo is seeking?

4 MS. LONGLEY: Yes, your Honor. We did provide
5 Mr. Cuomo with a privilege log. It was attached to our
6 responses and objections. And I believe it was submitted as an
7 exhibit to the Longley declaration.

8 THE COURT: Right. I think it's just categorical.

9 MS. LONGLEY: Okay.

10 THE COURT: There's not a document-by-document --

11 MS. LONGLEY: That has not been completed. No. That
12 hasn't been done.

13 THE COURT: Okay. All right. And then are you able
14 to speak to the status of the production in response to
15 Mr. Cuomo's FOIL requests?

16 MS. LONGLEY: I can briefly. I can say that
17 Mr. Cuomo -- I don't know when this case was started, but I can
18 say I think it was a while after this case was started he
19 submitted his first FOIL request to our office. And that --

20 Yes. Let me just say our report -- the Attorney
21 General's Office's Report on the allegations of sexual
22 harassment against the governor was released in August of 2021.
23 The trooper 1 lawsuit started in February of 2022. We were
24 first subpoenaed in July of 2022, and we first received a FOIL
25 request from former Governor Cuomo in July of 2023.

O58UBENC

1 It is being processed in the normal course. There is
2 a rolling production of the documents that are being produced
3 consistent with the FOIL timelines and standards. I can say
4 that thousands of pages have already been produced. They're
5 going to continue to be produced until a final determination is
6 made by the FOIL officers, at which point, if Mr. Cuomo
7 disagrees with the final, you know, resolution of that, he has
8 a right to administratively appeal that to the Attorney
9 General's Office. If he disagrees with that determination, he
10 can appeal that in the state court under Article 78.

11 THE COURT: Okay. Are there circumstances under which
12 the Attorney General could disclose the names of the witnesses
13 who were interviewed as part of the investigation?

14 MS. LONGLEY: Your Honor, that goes to the core of
15 what the Attorney General's Office is interested in protecting
16 against disclosure go to, and so the office has, so far, been
17 unwilling to provide a list, and that is because, as set forth
18 in the Trzaskoma declaration, there are over 100 witnesses to
19 the investigation whose identities are not publicly known. The
20 witnesses who are publicly known have experienced harassment
21 and retaliation by many of the defendants in this case because
22 they cooperated with the investigation. The investigators
23 determined at the time -- while the investigation was underway
24 that witnesses had credible fears of retaliation.
25 Unfortunately, many of those fears have borne out in a very

O58UBENC

1 public setting.

2 And so, you know, what I -- if I could maybe just take
3 a step back and talk about the investigation and Executive Law
4 63(8), I'd like to do that. I think that will address some of
5 your questions here.

6 The Attorney General's Office was authorized to
7 investigate under New York State Law Executive Law 63(8)
8 because they got a referral. Our office got a referral from
9 the former governor that gave us jurisdiction to conduct the
10 investigation. Confidentiality, including the confidentiality
11 of a witness' identities is baked into 63(8) and it provides
12 that anyone who shares information from the investigation,
13 including the identities of witnesses, can be subject to
14 misdemeanor liability. 63(8) also allows the Attorney General
15 to appoint officers to assist with an investigation. Those
16 officers do not have to be attorneys. They can be. But the
17 referral letter from the governor's office, which is Exhibit 1
18 to the Longley declaration does two things that are relevant
19 here: It requests that the people who conduct the
20 investigation be attorneys, evincing the understanding it would
21 be a privileged investigation. It sets up the investigation
22 under 63(8), which has confidentiality baked in, and it also
23 says, and this will be relevant later, that the findings will
24 be disclosed in a public report after the review. It doesn't
25 say anything about the full investigative file being disclosed.

O58UBENC

1 It's specific to the findings.

2 THE COURT: Right. But the Attorney General in this
3 case went beyond what 63(8) says and said, I will make the
4 investigation materials public. So didn't her statements
5 override even what the statute provides?

6 MS. LONGLEY: The Attorney General -- the statute
7 allows the Attorney General and in theory that the governor's
8 office have discretion about what can be disclosed. So the
9 Attorney General did have that discretion. What I will say
10 about the materials that were made public, those were done --
11 this was -- there was a lot of public interest in the
12 investigation. This was a high-stakes investigation. It led
13 to the governor deciding to resign. It lead to a fallout for
14 many other people. And the office determined it was important
15 to give the public as much information as it could to
16 understand the report without breaching in any way
17 confidentiality or identities of individuals who had fears of
18 retaliation.

19 And so what it did, it took a long time, and this will
20 go to the burden, it expended a lot of resources to very
21 carefully review and redact materials and make sure what was
22 released was narrowly material tailored to be actually
23 materials that the Attorney General's findings and conclusions,
24 and that it wasn't going to expose private, confidential
25 information about people who cooperated or their family members

O58UBENC

1 or friends.

2 THE COURT: Right. But I think what Ms. Trzaskoma is
3 saying on behalf of Mr. Cuomo is that was selective and that
4 there are statements, or there could be statements in what --
5 in the investigation materials that are helpful to Mr. Cuomo or
6 undercut Ms. Bennett's allegations, and simply the Attorney
7 General has just decided not to disclose those.

8 MS. LONGLEY: Your Honor, this -- I mean, that's in
9 the larger public relations, you know, world that we exist in,
10 and there are feelings about the report, but the Attorney
11 General hasn't put anything out there in terms of this
12 litigation, and there's -- they are speculating that maybe it
13 would be helpful to have some of the materials that they don't
14 have for the report. But civil discovery doesn't entitle them
15 to go into the internal investigative files of the law
16 enforcement agency just because it might be helpful to them.
17 And one of the things that they've said that they -- you know,
18 they were forcing them to do discovery the hard way, quote, the
19 hard way, and it's -- you know, we're just asking that they use
20 the information they have. Like, they know everyone who worked
21 in the executive chamber because their client was the boss.
22 They know who is in the plaintiff's initial disclosures and
23 people she intends to rely on. They have plenty of information
24 of what's publicly available to use that to conduct discovery
25 themselves. To say that, oh, it would be really convenient to

O58UBENC

1 have the top law enforcement agency's internal files that --
2 you know, the investigative teams' communications with each
3 other, that would be helpful. That's just not enough to get it
4 in this particular --

5 THE COURT: I don't think they're asking for the
6 team's communications, other than the memos. We're just
7 talking about if there's somebody who worked in the executive
8 chamber who said, Ms. Bennett made it all up, or, that's
9 totally wrong, I was there, and it was 180 degrees from the way
10 she described it, I'm not saying that there is a witness who
11 says that, but if there is a witness statement in the
12 investigative materials that undercuts her claims, that's
13 indisputably relevant here. And it sounds, based on what
14 you've said, that's not a statement that would support the
15 Attorney General's findings in the report. So that's something
16 that she has decided not to disclose, but it -- Mr. Cuomo has
17 an entitlement to it.

18 MS. LONGLEY: Your Honor, Mr. Cuomo has every ability
19 to go and depose former executive chamber employees that he
20 can -- that he wants to. He can depose the plaintiff and ask
21 her who knows what, and then depose those people. There's
22 nothing stopping him from doing that. And it's not relevant
23 what those witnesses -- you know, what OAG's deputized attorney
24 investigators wrote down in a memo about their conversations
25 with those witnesses. That's what's not relevant to this case.

O58UBENC

1 And he does not have, and we can get to this later on
2 privileges, in order to pierce even some of the ones that are
3 called, I would need a compelling need for the material, which
4 means he can't get it somewhere else. He hasn't tried to get
5 it somewhere else. He can't show that.

6 THE COURT: Have you seen how many subpoenas he wants
7 to issue in this case? We may be getting there.

8 MS. LONGLEY: Yes. But that goes to the heart of it.
9 And so, not to, you know, I'm certainly understanding that
10 people don't want to do -- want to be efficient in the world,
11 but for our office, the ability to protect the integrity of our
12 investigations and our investigative files, even when an
13 investigation is closed is really, really important. So it is
14 a huge burden and huge threat to our office's core functioning
15 to be able to fulfill its statutory and Constitutional
16 obligations. If every time we do an investigation the subject
17 of that investigation who has a documented history of
18 retaliating against people who cooperate in an investigation in
19 a case like this where there is just really not any relevance
20 or very marginal relevance and he could get it other ways, if
21 he's able to just peak behind the curtain and get into our
22 internal and confidential files, I think that really will be a
23 huge threat to the public's trust in our ability be to run
24 investigations and get cooperation from witnesses who put a lot
25 on the line to cooperate with our investigations, and it can

O58UBENC

1 play out in a lot of other areas, not just if we're
2 investigating a sitting governor.

3 THE COURT: Is deliberative process privilege off the
4 table. You're not asserting that anymore?

5 MS. LONGLEY: It's on the table, your Honor. We've
6 raised it on page 5 of our motion to -- our brief in support of
7 our motion to quash. We reference it and we attach our
8 responses -- we attach our responses and objections to the
9 subpoena where we raise it there. We didn't analyze it in
10 detail in the brief, but I'd be happy to explain our argument
11 for it now, but we are not -- it is not off the table.

12 THE COURT: All right. I don't need you to explain
13 it.

14 MS. LONGLEY: Okay. Thank you.

15 If I could say one more thing about the 63(8)
16 structure of the investigation, it's that, you know, when these
17 allegations were raised against the former governor, nothing
18 required him to use the vehicle of 63(8) to have this
19 investigation done. He could have had someone in his office
20 look into the allegations. He could have referred the
21 allegations to the Governor's Office of Employee Relations like
22 their policy required. He could have hired an outside counsel
23 to do it and said I'm going to have an open book investigation.
24 That's not what he did. He used 63(8), which has all there's
25 confidentiality provisions in and, you know, I think that the

O58UBENC

1 expectation of the state in how this investigation was set up
2 was one to protect confidentiality and privilege, and that
3 includes confidentiality of sources.

4 I also want to talk about just the litigation risks
5 that the office was aware of from the beginning. The office
6 anticipated, however the outcome of the investigation went,
7 that there was likely to be litigation coming from multiple
8 sides. If complainants -- if there was no finding,
9 complainants would not have been satisfied with the report and
10 the investigation. The findings went against the governor, as
11 they did, he would have -- we expected he would challenge it.
12 His attorneys had said so during the investigation. And that
13 also in March of 2021, which is the same month that our
14 investigation started, the Assembly Judiciary Committee opened
15 an impeachment investigation which obviously could lead to a
16 judicial proceeding of an impeachment proceeding. So those
17 were all built into how the investigation was structured.

18 And if I can talk a little bit about the interview
19 memos because it was something that your Honor said related to
20 communications. And so I want to just explain that. These
21 were -- so there were almost 200 witnesses that were
22 interviewed in the investigation. There were 79,000 documents
23 received. There was a great investigative team, but not every
24 single member of the investigative team could be at every
25 single interview or review every single document. And so what

O58UBENC

1 these memos were used to do was to have the one or two lawyers
2 who did do the interview memorialize what they thought was
3 important from the interview and use that to communicate with
4 the rest of the team about their mental impressions of it, the
5 information they gathered, and what they -- what was worth
6 writing down, what wasn't worth writing down, and what they
7 thought the next step should be. These memos were then shared
8 with the entire investigative team and they were used to
9 develop the investigative strategy throughout, and ultimately
10 considered by the lead investigators in how they came to their
11 conclusions and findings for the -- on the ultimate issue that
12 was asked by the client, which is OAG, which is whether the
13 governor engaged in sexual harassment or retaliation.

14 THE COURT: I know that I have your declaration, but
15 you were not a member of the investigation team?

16 MS. LONGLEY: I was not a member of the investigative
17 team. I was involved in the hiring. I don't want to become a
18 witness here. But I will say I was involved in the structuring
19 of the investigation and the investigator did report to me on
20 weekly basis.

21 THE COURT: Okay. Thank you.

22 MS. LONGLEY: I also want to say that these memos are
23 documents that have a lot of information including privileged
24 information. They also have sensitive information that's set
25 forth in the Trzaskoma declaration in paragraph 10. And this

O58UBENC

1 is -- I'll get to this later with the law enforcement
2 privilege, but I just want to paint a picture for the Court
3 that they have identities of witnesses who fear of retaliation,
4 they have PIIs. They have health information about witnesses
5 and others, including minor children. They have confidential
6 employment, personnel information. They have information about
7 law enforcement techniques and security plans, and they have
8 various other types of personal information about people's
9 romantic and sexual lives.

10 Witnesses were told that the investigation was being
11 conducted under 63(8). I believe they were given copies of the
12 law and which -- and so they were -- it was communicated to
13 them that there were these confidentiality provisions built in.
14 It was also assured to them by the investigators that OAG
15 viewed the information as confidential and would not be
16 disclosing except as necessary to fulfill the mandate to
17 conduct the investigation and publicly release the findings.

18 Quickly, and I actually just to get something
19 Ms. Trzaskoma said about redaction, I feel like a broken record
20 here, but because Mr. Cuomo's counsel keeps saying that the
21 memos have been redacted for all applicable privileges, and I
22 just want to dispel the Court of that idea. That's just not
23 true. The office is claiming privilege on the entirety of the
24 memos, but it's also, you know -- and if -- we hope we don't
25 get to this point, but if there a need to try to review to

O58UBENC

1 redact these memos, they are so replete with sensitive
2 information, privileged information, that that has not been
3 done and it would require a lot of resources to do.

4 And I want to just describe the transcripts briefly.
5 There are 41 transcripts on our website in redacted form. They
6 are very lightly redacted. And the redactions there are to
7 protect information covered by the law enforcement privilege.
8 As I said before, I think they were redacted in a way that we
9 wanted the public to be able to understand the report but we
10 didn't want to unnecessarily expose people's personal, private,
11 or embarrassing information, if it wasn't material to the
12 findings of the report, and we think that doing that in this
13 case, or any case, would discourage future cooperation from
14 witnesses if they think that, you know, any time -- oops, I
15 forgot, I mentioned this thing about, you know, a personal
16 thing and --

17 THE COURT: Right.

18 MS. LONGLEY: And it's now going to be disclosed even
19 though it's not material to anything.

20 Finally, before getting the merit's arguments, but I
21 am sensitive to the time but I do just want to talk a little
22 bit about the historical context in which we received the
23 subpoena in the Bennett case. In the Longley declaration,
24 paragraphs 41 to 45, it sets forth how investigators determined
25 there were credible fears of retaliation by witnesses, but

O58UBENC

1 also, in particular, starting on paragraph 44 of the Longley
2 declaration, it outlines very recent harassment of witnesses to
3 OAG's investigation. That includes the activities of Madeline
4 Cuomo acting at the direction of her brother and directing an
5 online group to publicize bimbo photos of the complainants.

6 THE COURT: I've had a lot of litigation about this.

7 MS. LONGLEY: Okay. You're familiar with it?

8 I'll just say, I don't know if you're familiar with
9 the Anna Liss-Jackson saga --

10 THE COURT: I understand what the Attorney General's
11 assertions are about retaliation and we don't need to go into
12 them.

13 MS. LONGLEY: Okay. I'll refer to my declarations
14 then.

15 What would be helpful to the Court in terms of going
16 through, you know, I would say that we have two types of
17 objections to the subpoena beyond sovereign immunity.

18 The first is that there's no relevance to these
19 materials, or even if there's marginal relevance, the burden on
20 our office of reviewing and producing that is undue and not
21 proportional --

22 THE COURT: You don't have to go into that either.

23 MS. LONGLEY: Okay. And what about privileges? So
24 that we three buckets of privileges.

25 THE COURT: I don't see how I can reach a decision on

O58UBENC

1 privilege issues without a log and without an in-camera review.
2 So I don't think we need to get into the merits of those points
3 today. But if you want to briefly make a record on anything,
4 you're welcome to.

5 MS. LONGLEY: I think we can --

6 Can I have one moment, your Honor --

7 THE COURT: Of course.

8 MS. LONGLEY: -- just to review my notes? Thank you.

9 Your Honor, I think what I will do is quickly just
10 state the privileges for the record, and then make one comment,
11 and then see if the Court has any questions.

12 THE COURT: Sure.

13 MS. LONGLEY: So the privileges that we're asserting
14 on the interview memos are attorney-client privilege, attorney
15 work product, deliberative process, and public interest
16 privileges, and law enforcement privilege. And then with
17 respect to the unredacted transcripts, the only privilege we
18 are asserting there is law enforcement privilege.

19 THE COURT: Okay.

20 MS. LONGLEY: And I would just make one closing remark
21 about law enforcement privilege in response to something that
22 counsel said, which is this idea that it would only be a slight
23 infringement somehow on the executive chamber, or to get
24 information from our investigative files to release these memos
25 would be some kind of slight infringement. And I just really

O58UBENC

1 could not disagree with that statement more and just say that
2 our office is very, very strongly opposed to becoming a tool
3 for Defendant Cuomo here to use our investigative materials to
4 try to further retaliate and harass people who were very brave
5 to cooperate with our investigation, and that, as our duties to
6 the state, are to also enforce the laws of the state including
7 the anti-harassment and discrimination of retaliation laws.
8 And we think there's a high risk that the materials would be
9 used to counter those purposes. And we think that it would
10 also create a really dangerous public perception that our
11 office can't protect witnesses and their sensitive information
12 from the targets of investigation in this case in this very
13 public way. This particular defendant and the other defendants
14 here are able to access these materials given the lack of need
15 for it in the Bennett case.

16 So for all of those witnesses, as well as state
17 sovereign immunity, we believe the subpoena should be quashed.

18 THE COURT: Thank you.

19 MS. LONGLEY: Thank you.

20 THE COURT: Mr. Weaver? Or Mr. Grant?

21 Let's take a five-minute break.

22 (Recess)

23 THE COURT: Mr. Weaver.

24 MR. WEAVER: Thank you, your Honor.

25 Andrew Weaver, Cleary Gottlieb Steen & Hamilton. I am

O58UBENC

1 here with my colleague from the Vladeck firm, Mr. Grant.

2 THE COURT: Yes.

3 MR. WEAVER: I'm mindful of the time, your Honor, and
4 plan to be extremely brief.

5 I'm, of course, here to any answer any questions you
6 might have but hoping to just wanting to clarify a discussion
7 of a case that was discussed earlier and, two, to make two
8 brief points on the question, if sovereign immunity applies,
9 whether that sovereign immunity would also support the firm's
10 quashing the subpoenas at issue here.

11 First, your Honor, you had asked the question earlier
12 whether there was any case applying *Ex parte Young* that had
13 invoked the Rules of the Enabling Act and you were pointed to
14 the Sixth Circuit case, the *Michigan Corrections* case. I just
15 wanted to clarify what was relevant about the Rules Enabling
16 Act in that holding, what Judge Sutton is doing that in opinion
17 was discussing the Supreme Court's decision and noting that
18 there was a question of whether there was an underlying cause
19 of action, and Judge Sutton speculated was that because the
20 relief sought in that case was procedural that arguably that
21 would not be needed because of the Rules Enabling Act. It was
22 certainly not the issue before the judge. It was not any part
23 of the decision for the reasons that were already argued, not
24 relevant, I think, to the facts here.

25 THE COURT: Thank you.

O58UBENC

1 MR. WEAVER: Your Honor, we, as was pointed out in our
2 papers, and won't repeat all of them here, there are unique
3 facts to this case as to why, if, assuming sovereign immunity
4 applies to the Attorney General, it would also extend to the
5 firms' motions to quash the subpoena.

6 The first point is a direct sovereign immunity
7 application, as you are well aware, and as already outlined,
8 this investigation, everything that was created as relevant
9 here arises out of Executive Law 63(8), and through that, the
10 Attorney General is authorized to deputize lawyers,
11 individuals, here they happen to be lawyers, to conduct the
12 investigation. So that's what the Attorney General did. And
13 the individuals who were deputized both as special deputies and
14 as special assistants were acting on behalf of the Attorney
15 General, conducting the Attorney General's investigation. The
16 Attorney General is authorized under the statute to conduct the
17 investigation and to deputize others today to do the Attorney
18 General's work here. So these individuals, the attorneys, are
19 clearly officers, and as such, if they were direct employees of
20 the Attorney General, I don't think there would be a question.
21 The only question is because they are technically nonemployees,
22 would the sovereign immunity apply. And I don't think there's
23 any question that it would to those special deputies and to the
24 special assistants, who were state actors.

25 Now, Defendant Cuomo has attempted to get around that

O58UBENC

1 point by serving the subpoenas on the firms themselves and not
2 on the special deputies and not on the special assistants
3 because I don't think there would be a question of sovereign
4 immunity would extend. But idea that the firms, where these
5 special deputies and special assistants are partners and
6 lawyers are somehow separate and distinct really doesn't
7 acknowledge the reality of what a lawyer in a law firm really
8 is.

9 And, in fact, putting aside the idea that the Attorney
10 General retained the law firm, which I'll address in my second
11 point, the fact that the documents exist at the firms exist
12 because these state actors, these agents who are members of the
13 firms or employees of the firms, created these documents. And
14 that's why they're there.

15 So the idea that the defendant could come and ask the
16 Attorney General to produce a set of documents and for your
17 Honor to rule that you cannot compel that because of sovereign
18 immunity and then go to those lawyers who created those
19 documents on behalf of the Attorney General, the very same
20 documents using the exact same process that the Attorney
21 General would use, if so compelled, does not apply, would
22 completely undermine that sovereign immunity exists and is
23 afforded, assuming your Honor rules such for the Attorney
24 General.

25 Now, separately though, the Court doesn't need to get

O58UBENC

1 to that point because, in addition to the special deputies and
2 the special assistants who were appointed pursuant to the
3 Executive Law 63(8), the Attorney General did retain the two
4 firms to provide legal and investigatory services in support of
5 the investigation. And Second Circuit case law was very clear
6 that where a client is privileged from producing information,
7 that client's information is also privileged if sought from the
8 lawyers, the law firm that holds that information.

9 Now, Defendant Cuomo argues that sovereign immunity is
10 not such a privilege, that it's captured by Second Circuit law.
11 But in our papers we cite to numerous cases from the Supreme
12 Court, Second Circuit, Southern District, that make clear
13 sovereign immunity is privilege. It is a privilege from not
14 being sued, from not being compelled. So if the Attorney
15 General is entitled to sovereign immunity and cannot be
16 compelled to produce those documents, then the lawyers, the law
17 firms that they have retained cannot be compelled to produce
18 those very same documents.

19 And I would just point to the Court -- the Supreme
20 Court's decision in *Fisher*, I think, clarifies this point. In
21 that case, it was an issue with a taxpayer and Fifth Amendment
22 privilege, and what the Court looked at in that case was and it
23 acknowledged if -- the client could not be compelled due to the
24 Fifth Amendment to produce its accounting records which were
25 given to the law firm for legal advice, then the law firm

O58UBENC

1 itself could not be compelled. The question before the Supreme
2 Court ended up being, did the underlying documents held by the
3 client, would compel the client to produce, violate the Fifth
4 Amendment. That was the question the Supreme Court decided.

5 But, here you may just assume the fact that the
6 underlying client information from the Attorney General is
7 protected by sovereign immunity and cannot be compelled. So
8 applying *Fisher* to the facts with that assumption, then it's
9 clear that if they are immune from being produced, the lawyers
10 who have that information, here the facts are even more special
11 because it's not like the Attorney General had the documents
12 and transferred them over, the documents were created within
13 the firm by the special deputies, by the special assistants,
14 within the work they did on behalf of the Attorney General as
15 state actors.

16 Accordingly, to the extent your Honor does find
17 sovereign immunity protects and is a basis for the Attorney
18 General to quash the subpoena, it's also a basis for the firms
19 to quash the subpoena.

20 I'm happy to answer any questions you have, your
21 Honor.

22 THE COURT: Okay. Thank you. I think I'm all set,
23 Mr. Weaver.

24 MR. WEAVER: Thank you.

25 THE COURT: Mr. Grant, do you want to add anything?

O58UBENC

1 MR. GRANT: No. I don't want to muck anything up.

2 THE COURT: Okay. You wouldn't be.

3 Then, Ms. Bennett's counsel, Ms. Schnell, did you want
4 to be heard today?

5 MS. SCHNELL: No. We don't have anything, your Honor.
6 Thank you.

7 THE COURT: Okay. Any of the other defendants'
8 counsel wish to be heard?

9 So, Ms. Trzaskoma, I'll give you 27 minutes.

10 MS. TRZAKOMA: Thank you, your Honor.

11 So a couple of corrections or amendments.

12 And just so the record is clear, in the FOIL
13 proceeding, I -- as Ms. Longley noted that FOIL request, which
14 we -- which we filed or, you know, the FOIL request, we made it
15 because the Attorney General's Office and the trooper 1 case
16 told us to make it and we filed it after our motion to compel
17 the subpoena in that case was denied. We certainly hoped that
18 we would be able to obtain the materials through subpoena. It
19 has taken nearly a year and we have received, although
20 Ms. Longley referred to thousands of pages, what she's
21 referring to is a production of a handful of transcripts that
22 had already been publicly released redacted form and those
23 transcripts were again redacted by the FOIL officer, I guess,
24 with different redactions.

25 So to be clear, our FOIL request requested unredacted

O58UBENC

1 transcripts and what we've gotten is a very small handful of
2 transcripts that have completely different redactions. it's
3 not -- it's just not a process by which we can obtain documents
4 for use here. And I am somewhat surprised, although not
5 really, that the Attorney General's Office cannot even tell you
6 or won't even tell you if the materials that were turned over
7 to the federal government voluntarily encompassed the materials
8 that are at issue here. Just that -- they don't have to give
9 names --

10 THE COURT: I know.

11 MS. TRZAKOMA: They don't have to say anything, except
12 did they already turn those documents over to the U.S.
13 Government? And if so, there can be no claim of sovereign
14 immunity not to produce those documents to another -- to a
15 federal court.

16 Going back to the question of whether *Henry* abrogates
17 *Morrison*, Mr. Amer focused on the fact that it was an
18 interstate -- that it was an interstate sovereign immunity
19 issue. If you -- if the Court looks back at the two cases that
20 the Attorney General's Office has relied on, *Milord*, which is a
21 Southern District case which in turn relies on *Morrison*,
22 *Morrison*, that principal case from New York State Court from
23 the Second Department -- or the First Department, I think.

24 THE COURT: Second.

25 MS. TRZAKOMA: Second Department, is an interstate

058UBENC

1 case. It's exactly the same. And it -- the argument about
2 sovereign immunity that the Attorney General's Office is making
3 is that sovereign immunity is sovereign immunity is sovereign
4 immunity is sovereign immunity, whether it's tribal, it's
5 state, it's federal, there is -- there is -- the argument about
6 *Henry* makes no sense considering their other positions.

7 I also -- I do want to address, because I hadn't had
8 an opportunity to address the question about whether the Cleary
9 and Vladeck firms are cloaked in sovereign immunity. They are
10 not. Courts have been very clear that a contractual
11 relationship like between the Attorney General's Office and the
12 Cleary and Vladeck firms is not enough to extend the
13 fundamental and carefully-limited immunity that states enjoy
14 where the only connection to the sovereign is by contract. In
15 fact, nearly every circuit court to have considered the issue
16 categorically denies extending state sovereign immunity to
17 private parties, and it doesn't matter whether the fact that
18 Cleary and Vladeck had the documents because their employees
19 were deputized at the one point, no longer are, or that it
20 arose out of an investigation. The fact -- the sovereign
21 immunity argument is that -- is the compulsion of the state to
22 act. That is what they're complaining about the Attorney
23 General's office. When -- if Cleary and Vladeck are directed
24 to turn over these materials, there is nothing compelling the
25 Attorney General's Office. It is an order compelling two

O58UBENC

1 private law firms and this is not a situation like in the
2 *Ghawanmeh* case that is cited in the firm's brief where an
3 employee -- you know, employees were subpoenaed and to obtain
4 the documents and produce them, they would have had to go in
5 and break into their employer's office and steal the documents.
6 Cleary and Vladeck had possession, custody, and control of
7 these documents, and it is not correct, as the Attorney
8 General's Office argues, and the firms argue, that they were --
9 that the Attorney General had exclusive control over these
10 documents.

11 The agreements between the Cleary and Vladeck firms
12 and the Attorney General's Office, in fact, contemplate that
13 there might be a subpoena to the firms for these documents and
14 the two firms retained the right to retain documents to the
15 extent they needed to for purposes of complying with their
16 ethical obligations.

17 And I -- and critically, the documents themselves are
18 not protected. They may be protected by a privilege but
19 immunity and state sovereign immunity is not the kind of
20 privilege that would protect a document. State sovereign
21 immunity protects the institution, not the documents.

22 I also do want to note that we have -- I think I said
23 that in connection with the Albany District Attorney's Office
24 discovery we received interview memos. We did also receive a
25 handful of unredacted transcripts. So we have a couple of

O58UBENC

1 those.

2 And then finally, I know your Honor doesn't want to
3 hear about the retaliation -- the alleged retaliation, but I
4 cannot let it go uncorrected. The so-called retaliation that
5 the Attorney General's Office is referring to is defense, is
6 Governor Cuomo's efforts to defend himself. If you look -- at
7 the Court looks at Ms. Longley's declaration, the instances of
8 harassing conduct are instances where the governor or his
9 counsel are criticizing the Attorney General's report, calling
10 it shoddy, biased, calling out that the Attorney General hasn't
11 shared all her evidence, that the investigators hadn't provided
12 Governor Cuomo with the information underlying the report, that
13 that they hadn't responded to written requests, that -- that
14 they disagreed with the information, that they thought that the
15 investigators were biased, and that the Attorney General was
16 politically motivated. That's not harassment. That's not
17 retaliation. That's just a defense.

18 And then if your Honor looks at what -- and I do
19 need -- I do need to correct the record on the deposition
20 transcript of Ms. Ana Liss-Jackson, which the Attorney General
21 does not -- it's inaccurate. That transcript was -- parts of
22 it were disclosed but the parties of that were disclosed
23 publicly, the attorney for Ms. Liss-Jackson had informed us
24 specifically that the -- that there were portions of the
25 transcript that were not subject to the protective order. He

O58UBENC

1 later changed his mind. Ms. Liss-Jackson apparently later
2 changed her mind but that whole transcript was not released.
3 The only portions that were ever released were portions that a
4 Ms. Liss-Jackson's told us could be released.

5 And, finally, the so-called harassing and retaliatory
6 discovery that is on page 18 of Ms. Longley's declaration,
7 those -- all of those relate to letters that nonparties
8 submitted to the trooper 1 Court complaining about the fact
9 that Governor Cuomo had subpoenaed them. And, again, the
10 trooper 1 complaint, very broad, includes all the allegations
11 relating to anything having -- any claimant in the Attorney
12 General's report. Of course, we had to subpoena them and their
13 key witnesses.

14 And we -- and what is more -- what is missing from
15 Ms. Longley's allegation that these were retaliatory acts is
16 that the Court has ordered those witnesses to comply with those
17 subpoenas. This isn't retaliatory. It's not harassing. This
18 is discovery. This is the way it works. And it is -- it is
19 outrageous that Governor Cuomo's effort to defend himself are
20 characterized like that and that his lawyers' efforts to do
21 their jobs are characterized like that.

22 And as for the contention by the Attorney General that
23 witnesses were promised confidentiality, I do not believe that
24 the Attorney General's Office could ever -- there was supposed
25 to be a written report -- every -- that was going to be

O58UBENC

1 released to the public -- every -- that was -- that was the
2 mandate, that was the referral letter, that was in the
3 engagement agreement, that was in -- that was -- that was the
4 purpose of this investigation, to issue a public report. How
5 on earth could the Attorney General's Office promise witnesses
6 that they would not release their information?

7 And the Attorney General's Office, for -- for the
8 Attorney General's Office to state on the record that they made
9 efforts to protect witnesses, that is just false because they
10 released, without any notice to those witnesses, including the
11 claimants, they released the report without notice to them and
12 they released their transcripts, and in certain instances,
13 their videotaped testimony without any notice to those
14 witnesses and included -- I have -- I just have to say this,
15 for example, Ms. DeRosa, who was a witness, her personal
16 information was disclosed by the Attorney General's Office. It
17 was splashed across -- across papers, personal information
18 about allegations that turned out not to be true.

19 So we have a protective order in this case. We will
20 abide by the protective order. There is no reason for us not
21 to know the names of people, of witnesses who were interviewed
22 by the Attorney General's Office. There is no reason for us
23 not to see the information including because to the extent
24 people were -- witnesses were talking about their personal
25 sexual experiences, some of those are directly relevant to this

O58UBENC

1 case.

2 THE COURT: Thank you.

3 MS. TRZAKOMA: Thank you.

4 THE COURT: Okay.

5 MR. AMER: I just had one point of clarification for
6 your Honor you had raised at the beginning of the argument, the
7 question about the narrower subpoena that was just served
8 recently in the Eastern District case.

9 THE COURT: Right.

10 MR. AMER: I didn't want the Court to be under any
11 misimpression that that was somehow narrower than the scope of
12 the subpoena here that we're litigating over. The two
13 subpoenas now are actually more coequal. They both seek the
14 two buckets of material, the unredacted transcripts and the
15 interview memos. I think there may be a handful fewer
16 interview memos being sought in the Eastern District just
17 because it's a different action, but, you know, I think that
18 the narrower subpoena is not narrower in any material respect
19 from the subpoena here.

20 THE COURT: Okay. Thank you for that clarification.

21 Anyone else? Any final points?

22 Okay. We will ask the parties to order a transcript
23 of this oral argument on a quick turnaround, if you would, so
24 that we can get a decision out to you as soon as possible.

25 I don't, at the moment, think there's any supplemental

O58UBENC

1 briefing that I need. If that changes, I will let you know as
2 soon as possible.

3 Thank you very much everyone.

4 Have a good afternoon.

5 We're adjourned.

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